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No. 04-473

In The
Supreme Court of the United States

GIL GARCETTI, *et al.*,

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsels' Association of California. The County Counsels' Association is comprised of county counsels throughout California. The County Counsels' Association, though its Litigation Overview Committee, monitors litigation of concern to counties statewide.

CSAC submits this brief because of the negative impact of the Ninth Circuit's decision on the management of public entities throughout the state of California, including interference with the important role of public entities in performing the work of the electorate. Because of its membership, CSAC is in a position to provide a unique perspective to this Court to aid in the decision of the important issues raised by Petitioner.

This Court should grant certiorari to consider the impact of the expansion of First Amendment protection to the expression of individual public employees during the course of assigned work on behalf of government. A majority of Circuits, concerned with protecting speech of government employees, have failed to protect the mandate of a public entity to carry out the work of its constituency. The result constrains and even subordinates the public employer prerogative to the individual expression of opinion by a public employee. Moreover, the current conflict among the Circuits creates uncertainty and confusion and results in widely differing decisions. Because of the detrimental impact of the Ninth Circuit's

decision on the counties of California, CSAC respectfully requests leave to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of the California State Association of Counties ("CSAC").[1] A motion for leave to file an amicus brief under Supreme Court rule 37.2(b) is included with this brief.

I. INTEREST OF *AMICUS CURIAE*

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsels' Association of California. The County Counsels' Association is comprised of county counsels throughout California. The County Counsels' Association, through its Litigation Overview Committee monitors litigation of concern to counties statewide.

CSAC has reviewed the Petition for Writ of Certiorari filed by Petitioners. CSAC finds the research and arguments in the Writ Petition clearly presented, well reasoned and legally sound; CSAC respectfully joins in these arguments.

The decision below and the split in the circuits regarding the appropriate application of the First Amendment in a public employment setting places an intolerable burden on public employers. First, public employers must conduct

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[1] Counsel for CSAC did not author this brief in whole. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

the business of the people, as directed by elected officials who must determine and pursue public policies. Employees must necessarily carry out that business. If an employee's routine employment responsibilities are imbued with First Amendment protection, then the public employer is put in the untenable position of having to weigh the work of the people, as guided by elected officials, against the expressed opinion of an employee – whether meritorious or not – whenever it considers an employment action related to the employee. Second, the inherent difficulty in distinguishing between protected and unprotected public employee speech subjects public employers to intolerable legal uncertainty. CSAC submits this brief to address the impact of the Ninth Circuit decision on public agencies in general and county government in particular, and to argue that certiorari review is needed to correct the Ninth Circuit's erroneous interpretation of the First Amendment and to resolve the growing inter-Circuit conflict.

II. SUMMARY OF ARGUMENT

Of necessity, the work of government must be performed through employees. To function at all, let alone efficiently and effectively, government must have the ability to regulate the on-duty speech of public employees. This Court has long recognized that a private citizen's right to free speech may be restricted once the citizen becomes a government employee. A public entity "is the spokesman for the Government. A [statement] made by [a public employee] must be attributed, for these purposes, to the Government." *Giglio v. United States,* 405 U.S. 150, 154 (1972).

The Ninth Circuit's decision, however, greatly undermines the ability of public agencies to perform the public's business by conferring First Amendment protection upon a public employee's personal expression that occurs in the context of that employee's work on behalf of government. The rule created by the Ninth Circuit expands the definition of speech of "public concern." This expanded definition encompasses volumes of speech made during the course of routine public employee duties. As a result, the public employer's capacity to supervise and marshal employee resources in the efficient management of the public's business is greatly crippled. The looming, yet uncertain, threat of federal judicial scrutiny may well chill the exercise of what would otherwise be rational, effective management practices.

The Ninth Circuit's application of First Amendment protection to the routine work of public employees has not been unanimously adopted by other Circuits. The inter-Circuit conflict creates a growing confusion and uncertainty over the proper standard. The growing misapplication of First Amendment protection to speech made *on behalf of the government* requires intervention by this Court.

III. ARGUMENT

THE NINTH CIRCUIT'S DECISION EXPANDING FIRST AMENDMENT PROTECTION FOR PUBLIC EMPLOYEE SPEECH MADE PURSUANT TO ROUTINE JOB REQUIREMENTS CREATES AN OVERWHELMING BURDEN ON PUBLIC EMPLOYERS AND FEDERAL COURTS.

Over thirty-five years ago, this Court first established the doctrine that speech by a government employee can,

under certain circumstances, be protected by the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Connick v. Myers*, 461 U.S. 138 (1983), however, the Court clarified that a federal court is not the proper forum to review personnel decisions where a public employee's speech is made "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest."

These decisions set the parameters for First Amendment protection for public employees. The decision below goes far beyond these parameters and articulates the untenable doctrine that "[i]t is only when it is clear that . . . the information would be of *no* relevance to the public's evaluation of the performance of government agencies that speech of government employees receives no protection under the First Amendment." *Ceballos v. Garcetti*, 361 F.3d 1168, 1174 (9th Cir. 2004) (Emphasis in original; internal quotations and citations omitted). On some level, all work of public employees provides a basis for the public's evaluation of the performance of government agencies. Must public entities ascribe actual or potential constitutional significance to public employee expression made in the context of routine, required work? The decision below answers that question affirmatively. But this standard affords protection to employee speech that has been recognized as subject to regulation by the government. Moreover, speech contained in a memorandum authored by a government employee being paid by the government to perform duties required by the government, such as the speech at issue in this case, is accurately characterized as the work of the government belonging to the government.

Indeed, the Ninth Circuit and a majority of other Circuits have stretched the application of *Connick's* term "public concern" so thin as to become meaningless. The interpretation of the *Connick/Pickering* balancing test by the majority of the circuits, if permitted to stand, will expose to federal judicial review an unlimited array of public employer personnel decisions which can be linked in any manner to an oral or written statement made by a public employee while performing his or her duties.[2] Under this balancing test, the public interest in promoting efficient conduct and management of the business of the people by public entities does not figure into the equation. That interest is relegated to a position subordinate to a perceived paramount interest in protecting individual speech by an individual public employee in the course of performing his or her job duties.

1. The Ninth Circuit's Analysis Ignores The Critical Distinction Between Government As Sovereign And Government As Employer.

This Court has consistently recognized that a private citizen's right to free speech is distinguishable from that of a government employee's right to free speech, especially when the speech is the work product of the employee acting in the course and scope of his or her duties as a government employee. It is axiomatic that a public employer may, at times, restrict the speech of its employees, for "our 'profound national commitment' to the freedom of speech must of necessity operate differently when the

[2] Invoking federal jurisdiction under this theory will not be a difficult task given that unsatisfactory performance on the job is at the root of most adverse employment decisions.

government acts as employer rather than sovereign." *Waters v. Churchill*, 511 U.S. 661, 679 (1994).

For example, while government cannot infringe upon a private citizen's manner of speech, public agencies can prevent employees while acting in the course and scope of their duties from using offensive speech to members of the public or co-workers. As employer, a public entity also may expect that its employees will not counsel other employees to violate the policies of the public entity in the discharge of their duties. Indeed, government may even prohibit an employee's off duty participation in political campaigns. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

It is well established, therefore, that just as the First Amendment affords government as an employer more latitude in regulating the speech of its employees than it may exercise in its role as sovereign over the speech of private citizens. These principles arise from the fact that government of necessity must act through its employees and from the public's interest in government that is effective and efficient in achieving its goals. By design and by law, government is required to perform particular functions. To that end, public entities must hire employees to carry out the public mandate in exchange for compensation and the satisfaction of working as a public servant. Inherent in this arrangement is the necessity that the employee is the instrument of the public entity and must carry out his or her job duties in accordance with governmental policies as articulated and directed by the employee's supervisor, or other policy makers.

Particularly employees who serve as subordinate deputies of an elected official can be expected to carry out

the policies of the official, as directed by that official. That official in turn answers to and carries out the will of her constituency. Principles of loyalty are essential to the discharge of a public employee's duties. Yet the Ninth Circuit would shield with the First Amendment an employee who rejects the elected official's policies or the implementation of those policies and speaks out – in connection with his or her job duties – against the will of that elected official.

Further, by extending First Amendment protection to all speech required by a public employee's job, the Ninth Circuit's decision essentially eliminates the "citizen" distinction recognized by *Connick* and ignores the employer's right to restrain speech made *on behalf of the government*. This expansion, coupled with the inconsistency and lack of direction among the Circuits regarding what is and what is not protected speech, creates a state of confusion and trepidation for public employers, and a climate for inaction to deal with employee misconduct or incompetence. Further, this interpretation turns on its head the notion that government does the work of the people. Elected officials and those acting at the direction of the elected officials must set the people's agenda. That agenda should not be preempted by an individual employee's personal agenda – no matter how noble that agenda may be.

2. The Ninth Circuit's Holding Substantially Interferes With The Rights Of Government To Regulate Speech Made On Its Behalf.

When a public employee speaks in the course and scope of his or her duties, he or she speaks for the

government.[3] The amount of speech of "public concern" generated by any random public employee during his or her public service career is virtually immeasurable. Some public servants in the course of their duties make public pronouncements almost daily. Examples include prosecutors, health and medical personnel, law enforcement officials, county counsel, tax assessors, and social service providers, to name but a few. It is alarming to contemplate that any instance of this speech could later form the jurisdictional basis for an action in federal court.

The holding below clothes such speech in First Amendment protection. This far-reaching result places additional restrictions on the public employer's management of its workforce. Yet public employers already face more regulation of the human resource function than the private sector. For example, public employers must observe employee due process rights and liberty interests. Civil service protections exist for many government employees. In some cases public employees are unionized and have protections built in through the collective bargaining process. The decision below recognizes a further employee right to express protected opinions about wrongdoing or corruption within the course and scope of his or her employment. As a practical matter this employee right, which must be considered and evaluated in connection with every personnel decision, will lead to virtual paralysis of the government processes in place to discipline or discharge unsatisfactory employees. Moreover, in

[3] As this Court has explained, a public entity "is the spokesman for the Government. A [statement] made by [a public employee] must be attributed, for these purposes, to the Government." *Giglio v. United States*, 405 U.S. 150, 154 (1972).

order to avoid liability in litigation, the public employer is likely to err on the side of foregoing corrective action in the case of an employee who has expressed criticism of government while carrying out job duties. As a result, the government will retain workers who have been identified by the government as ineffective or unsatisfactory.

We hasten to point out that overruling the decision below will not mean that corruption or official wrongdoing will or must go unpunished. In fact, there are federal and state laws that provide protection for "whistleblowing." The United States and California Constitutions generally protect public employees' right to off-duty speech about their public employer. In that context the burden to justify discipline shifts to the employer. That is, before the public employer can discipline an employee for off-duty speech the employer must demonstrate either (1) that the employee was not authorized to speak on behalf of the entity but held himself out as an authorized spokesperson speaking on behalf of the entity or (2) that the employee is a high ranking confidential adviser to the appointing officer and that confidence and trust of the appointing officer in the subordinate are essential qualifications of the job and that the specific off-duty speech undermined that trust. This standard gives wide latitude to most pubic employees who wish to speak out on their own time on matters of public interest.

A government employer should be free to make employment decisions related to speech made within the context of the public employee's job without having to exalt the employee's opinions over the government's imperative to do the work of the public. The burgeoning expansion of First Amendment rights for public employees cries out for intervention by this Court.

3. Review By This Court Is Necessary To Resolve Lack Of Uniformity Caused By Inter-Circuit Conflict On The Issue Of Public Employment Speech.

As set forth in Petitioner's Petition for Writ of Certiorari, conflict exists among the Circuits with respect to First Amendment protection in the public employment setting.

As a result, differing standards of constitutional protection for individuals and entities depend on the location of the public entity. While governmental entities are unable to change locations to gain the benefit of a more "employer-friendly" jurisdiction, fundamental fairness and principles of federalism dictate that public entities based in different states should not suffer differing burdens imposed by federal law.

IV. CONCLUSION

As argued by Petitioner, and supported by the foregoing additional reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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